

MARIA K. PUM, ESQ. (CA State Bar No.120987)
CHRISTINE F. KENMORE, ESQ. (CA State Bar No. 114983)
HENDERSON, CAVERLY, PUM & CHARNEY LLP
P.O. Box 9144 (all U.S. Mail)
16236 San Dieguito Road, Suite 4-13
Rancho Santa Fe, CA 92067-9144
Phone: (858) 756-6342
Fax: (858) 756-4732
Email: mpum@hcesq.com
ckenmore@hcesq.com

SHEA & CARLYON, LTD.
Candace C. Carlyon, Esq.
Nevada Bar No. 02666
701 E. Bridger, Suite 850
Las Vegas, NV 89101
Phone: (702) 471-7432
Fax: (702) 471-7435
Email: ccarlyon@sheacarlyon.com

Attorneys for Secured Creditor
WELLS FARGO BANK, N.A.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re

A & A DAIRY,

Debtor.

Case No.: 10-52539-GWZ

**OPPOSITION OF WELLS FARGO BANK
TO MOTION TO APPROVE CAL BY-
PRODUCTS AS CRITICAL VENDOR
AND TO RATIFY LIEN GRANTED
DURING PREFERENCE PERIOD**


Date: October 6, 2010
Time: 10:00 a.m.

WELLS FARGO BANK, National Association (the “Bank”) hereby objects to the Motion to Approve Cal By-Products as Critical Vendor and to Ratify Lien Granted During Preference Period (“Motion”) filed on behalf of A&A Dairy, a California general partnership (the “Debtor”) on July 27, 2010.

This Objection is made and based upon the Points and Authorities and exhibits attached

1 hereto, the Declaration of Benjamin D. Casey filed herewith (the "Casey Declaration"), the
2 pleadings, papers and records on file in this action, and any oral argument to be presented at the
3 time of the hearing of the Motion.

4 Dated this 21st day of September, 2010.

5
6  for
7 HENDERSON, CAVERLY, PUM & CHARNEY
8 LLP
9 Christine F. Kenmore, Esq.

10 And

11 SHEA & CARLYON, LTD.
12 Candace C. Carlyon, Esq.
13 Attorneys for WELLS FARGO BANK, N.A.,
14 Secured Creditor

15 POINTS AND AUTHORITIES

16 I.

17 FACTUAL SUMMARY

18 A. On June 29, 2010 (the "Petition Date"), the Debtor commenced the above-
19 captioned chapter 11 case (the "Chapter 11 Case") by filing a voluntary petition for relief under
20 chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") with the United States
21 Bankruptcy Court for District of Nevada (the "Bankruptcy Court"). No trustee has been
22 appointed and the Debtor continues to operate its business and manage its properties as a debtor
in possession pursuant to Bankruptcy Code sections 1107 and 1108.

23 B. At the time the Debtor's bankruptcy petition was filed, the Debtor was indebted to
24 the Bank in an amount close to \$5,000,000.

25 C. All of the Bank debt was (and remains) secured by (among other things) all real
26 and personal property and other assets owned by the Debtor. See, e.g., Declaration of Benjamin
27 D. Casey in support of Opposition of Wells Fargo Bank to (1) Motion to Approve Debtor's Use
28 of Cash Collateral Pursuant to 11 U.S.C. §363; (2) Motion to Approve Debtor's Entry Into Dairy

1 Herd Retirement Program; and (3) Motion to Approve Sale of Assets Pursuant to 11 U.S.C. §363
2 at ¶5(f)-(i); Debtor's Schedule D on file in this case, appearing at Docket #1, pps. 13-14.

3 D. Due to certain payments received post-petition from proceeds of the Bank's
4 collateral, the Bank debt as of September 20, 2010 (other than accrued and unpaid interest and
5 costs and expenses) was equal to \$3,214,004.87. Casey Declaration at ¶5D.

6 E. In contravention of the terms of its loan documents with the Bank, and
7 unbeknownst to the Bank, the Debtor granted Cal By-Products a junior lien on real estate owned
8 by the Debtor and already pledged to the Bank, which was recorded within 90 days of the
9 Petition Date. Pursuant to the terms of the Motion, this was done to encourage Cal By-Products
10 to continue to provide feed to the Debtor prior to (and after) the Petition Date. Motion at p. 2, ¶4.

11 F. Based on financial information prepared by the Debtor attached hereto as Exhibit
12 A (and filed with the Bankruptcy Court on July 30, 2010 as an Exhibit to the Cash Collateral
13 Stipulation entered into between Bank and the Debtor), it appears that *in addition to* the granting
14 of the preferential lien (and the COD payment for all deliveries of feed after the granting of such
15 lien) made unauthorized post-petition payments (and may have made certain preferential pre-
16 petition payments¹) to Cal By-Products on account of pre-petition accounts payable as a
17 condition to its receipt of further feed from such supplier. See, Exhibit A listing of payments
18 made post-petition to Cal By-Products.

19 G. Bank believes the amount of such unauthorized and preferential post-petition
20 payments from the Debtor to Cal By-Products to aggregate in excess of \$60,000. See, Exhibit A
21 listing of (i) the aggregate amount of checks (#50283 and # 50305) paid by the Debtor post-
22 petition to Cal By-Products equal to \$72,441.54 less (ii) aggregate balance of bills submitted
23 post-petition by Cal By-Products equal to \$11,221.07.

24 H. Based on financial information prepared by the Debtor and filed with the
25 Bankruptcy Court, and contrary to the statements contained in the Motion, Cal By-Products was
26 not the only feed supplier who continued to work with Debtor to help fill the Debtor's critical
27

28 ¹ Debtor's Amended Statement of Financial Affairs lists \$223,198.00 paid to Cal By-
Products in the 90 days prior to the petition. See Docket #9, p. 3.

pre-petition and post-petition needs for feed. Specifically, California Ag Commodities continues to provide the Debtor with feed – seemingly for *greater* amounts than Cal By-Products. See, Exhibit A listing of commodities bills presented by California Ag Commodities to Debtor post-petition

I. Debtor had wound down its operations as a dairy by late July 2010 (when Debtor auctioned off the bulk of its cattle) and Cal By-Products has not provided the Debtor with a shipment of feed since mid July 2010 at the very latest – a mere 2 weeks into the pendency of this Case. See Exhibit A.

J. The total value of feed provided to the Debtor by Cal By-Products post-petition was approximately \$10,280.68. See Exhibit A.

K. Although a creditor’s committee was appointed on July 22, 2010 (Docket No. 16), the docket does not reflect any appearance by any proposed committee counsel.

II.

ARGUMENT

The “critical vendor” theory has been judicially created on equitable grounds to afford some incentive and relief to pre-petition creditors willing to continue to do business with a debtor-in-possession. Because such a request would vary the payment priorities set forth by the Bankruptcy Code, such exceptions should be narrowly drawn. See, e.g., In re Tropical Sportswear Int'l Corp., 320 B.R. 15, 17 (Bankr.M.D.Fla.2005); In re Fultonville Metal Products Co., 330 B.R. 305, 313 (Bkrtcy.M.D.Fla.,2005).

The form of such relief depends on the facts of the individual case. However, at a minimum, the Debtor must make an evidentiary showing that: “(1) the payments were necessary to the debtor's reorganization; (2) that a sound business reason justified the payments, in that the vendors would refuse to do business with the debtor absent the payments; and (3) that the disfavored creditors would not be harmed by the payments.” In re Tropical Sportswear, 320 B.R. at 17. In this case, in consideration of \$10,000 worth of post-petition product (for which the alleged “critical vendor” has already been paid), the Debtor requests this Court to:

///

- 1 (1) Ratify a preferential lien securing \$240,000 of debt while failing to disclose
- 2 other preferential benefits already given to this vendor;
- 3 (2) Prefer this vendor over another similar vendor who provided a greater
- 4 amount - approximately \$43,000 - of similar product to the Debtor post-
- 5 petition; and
- 6 (3) Characterize a vendor as “critical” based on nominal post-petition
- 7 cooperation with the Debtor and well after any further need by the Debtor for
- 8 this vendor’s cooperation has long since elapsed.

9 The foregoing is neither equitable nor logical in this Case. Nor does the Debtor meet the
 10 four-part evidentiary burden. The payments are clearly not necessary to the Debtor’s
 11 reorganization-in fact, the Debtor has sold its dairy herd, such that payment to the feed supplier is
 12 on no way necessary to any reorganization effort. Second, there is no showing of either the
 13 refusal of the vendor to do business with the Debtor in the future nor any showing that such
 14 business is even contemplated given the completed herd liquidation. Third, there is no showing
 15 with regard to the impact of such payments on other creditors. Given that the Bank has a senior
 16 lien on the Debtor’s assets, the contrary is true-every dollar which has been paid to Cal By-
 17 Products has come from Wells Fargo’s collateral, and is likely to create an equal reduction in
 18 recovery to Wells Fargo.²

19 The only case cited by Debtor, In re Brown & Cole Stores, LLC, 375 B.R. 873, 875 n.3
 20 (9th Cir. BAP 2007) illustrates the fact that this Court need not attempt to stretch the “doctrine of
 21 necessity” to the claim here at issue. In Brown, the court interpreted the allowance of
 22 administrative priority to 20 day reclamation claims under the 2005 amendments to Bankruptcy
 23 Code §503(b)(9). The court held that such administrative expense priority could be asserted even
 24 by a secured creditor, based upon the clear wording of the 2005 amendments. In this case, there
 25 is no showing of any amount as to which a §503(b)(9) reclamation claim might be granted, nor is

26
 27 ² Conversely, if the Debtor is solvent, all creditors, including Cal By-Products, will be
 28 paid in full, and there is no necessity of ruling now with regard to the lien granted during the
 preference period.

there a request being made for an administrative priority under that section. The existence of the remedy under §509(b)(9)³ illustrates that the granting (or validating) a \$240,000 lien is neither a necessary nor an appropriate deviation from the statutory priorities established by the Bankruptcy Code. It is especially troubling that it appears that the Debtor may be attempting to validate unauthorized post-petition payments on pre-petition debt, and to create a defense to what may be preferential pre-petition payments, to Cal By-Products.

III.

CONCLUSION

For the foregoing reasons, the Bank respectfully requests that this Court deny each of the Debtor's requests to (a) approve Cal By-Products as a critical vendor, and (b) ratify the lien granted by Debtor to Cal By-Products during the preference period; and grant such other and further relief as is appropriate in the circumstances.

Dated this 21st day of September, 2010.

Met a Bank for
 HENDERSON, CAVERLY, PUM & CHARNEY
 LLP
 Christine F. Kenmore, Esq.

And

SHEA & CARLYON, LTD.
 Candace C. Carlyon, Esq.
 Attorneys for WELLS FARGO BANK, N.A.,
 Secured Creditor

³ Nor would such a result be appropriate in light of the existing statutory framework set out in Bankruptcy Code §547(c)(3)(a), which would permit a showing, in the context of an adversary proceeding as required by Fed.R.Bankr.P. Rule 7001(a), the creditor to avoid in part the challenge to a preferential transfer to the extent it secured new value.

EXHIBIT A

6:46 AM
07/30/10

A & A Dairy
Transaction List by Vendor
June 30 through July 30, 2010

BI-State Propane

Type	Date	June 30 through July 30, 2010 Num	Mem	Account	Split	Amount
Credit	07/02/2010	G560526		427 - Accounts Payable	751 - Utilities	232.81
Bill	07/08/2010	614857		427 - Accounts Payable	751 - Utilities	-234.54
Bill	07/08/2010	614856		427 - Accounts Payable	751 - Utilities	-461.57
Bill	07/08/2010	915329		427 - Accounts Payable	751 - Utilities	-1.00
Bill	07/08/2010	614880		427 - Accounts Payable	751 - Utilities	-211.00
Bill	07/27/2010	144176		427 - Accounts Payable	751 - Utilities	-396.02
Bill	07/27/2010	615029		427 - Accounts Payable	751 - Utilities	-450.81
Bill	07/27/2010	615030		427 - Accounts Payable	751 - Utilities	-224.88
Bill Pmt -Check	07/28/2010	50332		107 - NV State Bank Checking	427 - Accounts Payable	-1,979.82
Bill	06/30/2010	384583		427 - Accounts Payable	770 - Interest Expense	-940.39
Bill	06/30/2010	384990		427 - Accounts Payable	702 - Commodities	-4,821.60
Check	07/02/2010	50283		107 - NV State Bank Checking	702 - Commodities	-40,000.00
Bill	07/08/2010	384991		427 - Accounts Payable	702 - Commodities	-5,459.08
Check	07/15/2010	50305		107 - NV State Bank Checking	702 - Commodities	-32,441.54
Bill	07/01/2010	13275	ddg/189	427 - Accounts Payable	702 - Commodities	-4,229.82
Bill	07/02/2010	13225	gluten/171	427 - Accounts Payable	702 - Commodities	-4,245.93
Bill	07/03/2010	13259	ddg/189	427 - Accounts Payable	702 - Commodities	-4,227.93
Bill	07/06/2010	13204	hfr mix/118	427 - Accounts Payable	702 - Commodities	-2,847.34
Bill	07/06/2010	13277	gluten/172	427 - Accounts Payable	702 - Commodities	-4,177.88
Bill	07/07/2010	13276	canola/325	427 - Accounts Payable	702 - Commodities	-7,988.50
Bill	07/12/2010	13299	hfr mix/118	427 - Accounts Payable	702 - Commodities	-2,888.64
Bill	07/12/2010	13300	gluten/154	427 - Accounts Payable	702 - Commodities	-3,874.64
Bill	07/13/2010	13301	ddg/197	427 - Accounts Payable	702 - Commodities	-4,781.19
Bill	07/13/2010	13315	ddg/197	427 - Accounts Payable	702 - Commodities	-4,038.78
Bill Pmt -Check	07/25/2010	50317		107 - NV State Bank Checking	427 - Accounts Payable	-80,328.65
Bill	07/14/2010	jul10 prem		427 - Accounts Payable	-SPLIT-	-64.80

California Ag Commodities

CARA

6:46 AM
07/30/10

A & A Dairy
Transaction List by Vendor
June 30 through July 30, 2010
Mem6

Type	Date	June 30 Num	Account	Split	Amount
Bill Pmt -Check	07/25/2010	50318	107 - NV State Bank Checking	427 - Accounts Payable	-129.60
CC Communications					
Bill Pmt -Check	07/15/2010	50303	107 - NV State Bank Checking	427 - Accounts Payable	-393.70
Chartis - Workers Comp Ins					
Bill Pmt -Check	07/25/2010	50319	107 - NV State Bank Checking	427 - Accounts Payable	-1,122.00
Churchill County Clerk-Treasurer					
Bill	07/09/2010	jul10.2888	427 - Accounts Payable	755 - Taxes & Licenses	-102.03
Bill	07/09/2010	jul10.4911	427 - Accounts Payable	755 - Taxes & Licenses	-25.93
Bill	07/09/2010	jul10.8960	427 - Accounts Payable	755 - Taxes & Licenses	-1,079.59
Bill Pmt -Check	07/25/2010	50320	107 - NV State Bank Checking	427 - Accounts Payable	-1,207.55
City of Fallon					
Bill	07/15/2010	jul10.stm	427 - Accounts Payable	799 - Miscellaneous	-245.00
Bill Pmt -Check	07/25/2010	50321	107 - NV State Bank Checking	427 - Accounts Payable	-245.00
D & D Plumbing					
Bill	07/07/2010	100707-012	427 - Accounts Payable	748 - Repairs	-1,445.37
D Bar M Holsteins					
Check	07/02/2010	50284	107 - NV State Bank Checking	733 - Rent - Milk Cows	-4,100.00
D Bar M Holsteins, Inc.					
Bill	06/30/2010	jun10.FC	427 - Accounts Payable	770 - Interest Expense	-641.41
Dan Alegre					
Check	07/01/2010		107 - NV State Bank Checking	505 - Draws on Capital	-4,166.00
Darrin Alegre					
Check	07/15/2010	50304	107 - NV State Bank Checking	765 - Fuel & Oil	-600.00
Check	07/22/2010	50316	107 - NV State Bank Checking	799 - Miscellaneous	-25.45

6:45 AM
07/30/10

A & A Dairy
Transaction List by Vendor
 June 30 through July 30, 2010

	Type	Date	Num	Mem	Account	Split	Amount
DMV	Bill	07/01/2010	Jul10.ALEGRE		427 - Accounts Payable		
	Bill Pmt -Check	07/25/2010	50322		107 - NV State Bank Checking	755 - Taxes & Licenses 427 - Accounts Payable	-187.00 -187.00
Equitable	General Journal	07/16/2010		health ins prem	724 - Dan Guaranteed payment	107 - NV State Bank Checking	269.17
Ernst Ranch & Dairy Supplies	Bill	06/30/2010	Jun.FC		427 - Accounts Payable	770 - Interest Expense	-7.49
Farm Plan	Bill	07/08/2010	Jul10.stm	#75317-50912	427 - Accounts Payable	748 - Repairs	-621.32
	Bill	07/08/2010	Jul10.FC	#75317-50912	427 - Accounts Payable	770 - Interest Expense	-70.50
	Bill Pmt -Check	07/25/2010	50323		107 - NV State Bank Checking	427 - Accounts Payable	-691.82
Health Plan Administrators Inc	Bill	07/04/2010	Jul10.prem		427 - Accounts Payable	-SPLIT-	-661.97
	Bill Pmt -Check	07/25/2010	50324		107 - NV State Bank Checking	427 - Accounts Payable	-1,323.94
HFI	Bill	07/08/2010	484		427 - Accounts Payable	748 - Repairs	-45.00
	Bill	07/09/2010	485		427 - Accounts Payable	748 - Repairs	-250.86
Internal Revenue Service	Liability Check	06/30/2010	943Jun.10	94-2085568	107 - NV State Bank Checking	-SPLIT-	-2,661.32
	Liability Check	06/30/2010	943Jun.10	94-2085568	107 - NV State Bank Checking	-SPLIT-	-348.16
	Liability Check	07/14/2010	943Jul10	94-2085568	107 - NV State Bank Checking	-SPLIT-	-2,019.56
Lahontan Valley Vet	Bill	06/30/2010	Jun10.FC		427 - Accounts Payable	770 - Interest Expense	-43.21

6:46 AM
07/30/10

A & A Dairy
Transaction List by Vendor
June 30 through July 30, 2010
Memo

	Type	Date	Num	Account	Split	Amount
Louie's Home Center Inc	Bill	06/30/2010	jun10.stm	427 - Accounts Payable	748 - Repairs	-102.21
MSE Welding & Fabrication	Bill	07/02/2010	jul10.stm	427 - Accounts Payable	748 - Repairs	-2,080.18
Nevada Dept. of Taxation/Modified Bus. Ta	Check	07/19/2010	50311	107 - NV State Bank Checking	755 - Taxes & Licenses	-733.01
NV Employment Security Division	Liability Check	07/19/2010	50309	107 - NV State Bank Checking	426 - Payroll Liabilities	-316.78
NV Energy	Bill	07/01/2010	jul10.stm	427 - Accounts Payable	-SPLIT-	-5,757.34
NV State Collections & Disbursement Unit	Liability Check	06/30/2010	50264	107 - NV State Bank Checking	426 - Payroll Liabilities	-153.00
	Liability Check	07/15/2010	50300	107 - NV State Bank Checking	426 - Payroll Liabilities	-153.00
NV State Treasurer	Liability Check	07/19/2010	50308	107 - NV State Bank Checking	426 - Payroll Liabilities	-12.00
Oasis Air Conditioning, Heating, & Sheet	Bill	07/19/2010	16631	427 - Accounts Payable	748 - Repairs	-126.96
Payroll		06/30/2010		Salaries & Wages		-18,500.00
		07/15/2010		Salaries & Wages		-13,227.00
Postmaster	Check	07/19/2010	50312	107 - NV State Bank Checking	799 - Miscellaneous	-44.00
Principal Financial Group	General Journal	07/15/2010		Insurance - Health	-SPLIT-	-643.36

6:46 AM
07/30/10

A & A Dairy **Transaction List by Vendor**

	Type	Date	Num	June 30 through July 30, 2010	Account	Split	Amount
	General Journal	07/15/2010		stefanie	Insurance - Health		-457.22
US Trustee		07/07/2010	2010 Q2	Acct#783-10-52539	427 · Accounts Payable	768 · Professional Fees	-650.00
Verizon Wireless	Bill	07/25/2010	50329	565784972	107 · NV State Bank Checking	427 · Accounts Payable	-147.10
Walco International	Bill	06/30/2010	jun10.stm		427 · Accounts Payable	-SPLIT-	-29,944.12
Wedco Inc.	Bill	07/08/2010	933581		427 · Accounts Payable	748 · Repairs	-13.95
Wells Fargo Bank	Bill Pmt -Check	07/19/2010	940/Q2	94-2085568	107 · NV State Bank Checking	FUTA payable	-151.69
Western Energetix, LLC	Liability Check	06/30/2010	289235		427 · Accounts Payable	-SPLIT-	-608.34
		07/15/2010	291497		427 · Accounts Payable		-572.40
Zapfen Dairy Management	Bill	07/14/2010	9232		427 · Accounts Payable	748 · Repairs	-460.00
		07/14/2010	9241		427 · Accounts Payable	748 · Repairs	-826.39
							-311,140.21